No. 2975

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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COGGESHALL LAUNCH COMPANY
(a corporation),

Appellant,

vs.

ELIZA A. EARLY, claimant,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

CLARENCE COONAN,
Eureka,

NAT SCHMULOWITZ,
San Francisco,

Proctors for Appellant and Petitioner.

P. H. RYAN,
Eureka,
Of Counsel.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellant, Coggeshall Launch Company, respectfully asks a rehearing in this case, that further consideration may be given to a point which we apprehend has been misconceived by the court and to two other points, not considered by either this court or by the District Court, and which we believe should be considered.

The three points to which reference is made are:

1. Does not the evidence herein disclose contributory negligence?

2. Does not the evidence herein disclose a situation where there should be an apportionment of damages between appellant and appellee?

3. Does not the evidence herein disclose a situation showing negligence in Emmett Whelihan and Alva Moss and should there not on that account be a diminution of the appellant's damages?

I.

THE EVIDENCE HEREIN DISCLOSES CONTRIBUTORY NEGLIGENCE.

This question was fully discussed in the Appellant's Brief (pages 37-67 incl.) and it is not our desire to make an extended argument upon the same. However, there are certain phases of this subject not fully discussed in the brief and in order to place this court more fully in possession of our theory of the law of contributory negligence, it is necessary to discuss the same to some extent.

Contributory negligence may be defined as negligence of plaintiff which together with the negligence of the defendant causes an injury to plaintiff. It is not susceptible to a precise rule covering any situation but may be defined as a failure by plaintiff to act as an ordinarily prudent man would have acted under the same circumstances. In the instant case it is our contention that Early did not act as an ordinarily prudent man; that he did not exercise the same amount of care for his safety

on the evening of the accident as an ordinarily prudent man would have exercised. The proofs of this contention are two: one, the extent to which Early used his senses on the occasion in question; second, the experience of other men in the same position as Early on that same occasion.

In regard to the first basis of the contention: Physical activity of a human being, can only result from acquisition of knowledge and the judgment made from such knowledge. In the case at hand we do not know what knowledge Early acquired. We only know, that if he did acquire knowledge of the unusual danger by the bar not being in place, he was guilty of negligence in placing himself in a dangerous position. The question is then: Did he acquire knowledge? This question may be broadened and the law still be satisfied—Did he acquire knowledge of the danger, or was a situation presented where an ordinarily prudent man would have acquired knowledge of the danger? In either case his conduct would have been negligent. No one can state that Early did or did not actually acquire knowledge of the dangerous condition of the porthole, as no evidence is adduced on this subject; but we can investigate the surrounding facts and state whether an ordinarily prudent man would have seen the danger.

Knowledge is acquired by human beings through the senses. We are aware, we know, because of sensory impressions communicated to our brains. In the instant case because we do not actually know

whether or not Early noticed the absence of the bar, our investigation concerns itself with the number of sensory impressions the ordinarily prudent man would have received if he had been in Early's place and whether these impressions would have given the ordinarily prudent man knowledge of the absence of the bar.

The evidence of the observability of this factor, to wit, the absence of the bar, all adduced by witnesses for claimant, is as follows:

Early had been a daily passenger on the "Antelope" for five years. On the evening of the accident prior to the opening of the door he was standing on the lower deck of the "Antelope" three feet from the doorway. He saw his companions open the door, and he saw the door stick when it was open about 6 or 6½ feet, and while there was 1½ to 2 feet of the doorway still barred by the door, Early went to the door and assisted in completing the work of fully opening it. Then Early fell overboard. It appears that at one time three persons, Early being one, were pushing on the end of the door and that the place for the bar was about an inch outside of the door. The bar was about 8 feet long and 6 inches wide and when in place was about 3 feet from the deck. It was not dark, though not wholly light (see pages 39 to 45 of Appellant's Brief which sets forth the evidence more fully).

With these facts in view the trial court in its opinion states:

> "From all the surrounding circumstances I am compelled to the belief that with his attention fixed on the door which had stuck, he approached it with his side to the doorway without observing or pausing to observe its unprotected condition, but relying on the fact that the bar had always been in place" (Apostles p. 285).

The excerpt contains the nearest approach in the trial court's opinion of any consideration of the observability of the unprotected condition of the doorway. There is no statement in the opinion as to what an ordinarily prudent man would have seen, or what Early should have seen; and the question now before this court, is not what Early observed, but what, in the use of his senses, he should have observed. Furthermore, there are no surrounding circumstances,—there is no proof that Early's attention was fixed on the stuck door, that all other matters were excluded from his mind, nor that he approached the door with his side to the ship and that he failed to observe or paused to observe the condition of the doorway. The evidence gives us no information as to the extent or direction of Early's attention as he approached the doorway or how he approached the door or his knowledge of the dangerous condition of the door; he may have known of its unprotected condition and he may not have known.

But the evidence does tell us:

1. That it was light enough to notice the absence of the bar (Apostles pp. 152, 131, 141).

2. That the bar was not a small object, the absence of which would naturally be unnoticed but was large, being about 8 feet long and 6 inches across (Apostles pp. 82, 116).

3. That the position of the bar when in place was not near the deck and below the line of vision, but was about 3 feet above the deck (Apostles p. 82).

4. That Early approached the opening, as he must have done to approach the door (Apostles pp. 156, 102, 122).

5. That Early actually pushed on the door between his two companions (Apostles pp. 117, 134, 135, 136) and must have been near the actual opening occasioned by opening the door in the absence of the bar.

Under these facts, established by claimant's witnesses, is it possible that the ordinarily prudent man would not have noticed the absence of the bar and the danger present therefrom? The evidence is, there was light enough to see; that the bar was large, and near the range of vision so its absence would be easily noticed; and that Early actually shoved on the door from a point very near the place where the bar should have been. Certainly if Early did not observe the absence of the bar, must he not have been conscious of its absence by virtue of the fact that three persons, himself included, pushed on the end of the door without the accompanying awkwardness which would result

from the presence of a bar an inch outside of the point where their hands were shoving? The trial court has not discussed these factors in its opinion, which factors other courts have considered, and have held that they were factors of the observability of the danger, and of contributory negligence. These cases are considered in Appellant's Brief. Petitioner hereby refers to pages 46 to 65 thereof as bearing out this statement.

The second consideration under this general subject of contributory negligence is the knowledge of others as to the condition of this doorway on the afternoon of the accident. Claimant called as witnesses four fellow-passengers of Early. Their names were Alva Moss, Joseph Whelihan, Emmett Whelihan and Otto Johnson. The three first named were intimate or close friends of Early (Apostles pp. 101, 126, 146). Moss it seems noticed the bar was down when he closed the door at Samoa (Apostles p. 106). Joseph Whelihan, Emmett Whelihan and Otto Johnson noticed the bar was down after the vessel left Samoa and before the accident; evidently, while the door was being opened (Apostles pp. 131, 152, 141). In discussing the question whether Early did notice the absence of the bar, or whether an ordinarily prudent man would have noticed the same, what consideration is to be given to the testimony of these four witnesses who did notice the absence of the bar? Should we arbitrarily set their testimony aside and say they are not ordinarily prudent men,

and that their observation of this fact stamps them as ultra-careful men? Should we view their powers of observation as extraordinary? There is no evidence that Moss, the two Whelihans or Johnson are to be thus categoried, and in consequence must be classed only as ordinary men with ordinary powers of observation and of ordinary prudence.

If that is true, how must we consider the conduct of Early, who either did have the same experience as the four witnesses and saw the bar was down, or who failed to notice what the others did notice? In one case Early was negligent in not using knowledge as an ordinarily prudent man. In the other case Early was negligent in not acquiring knowledge from factors which would have conveyed knowledge to an ordinarily prudent man.

It may be contended that Early's experience was different from the others—that his opportunities of acquiring knowledge were different. This is most likely true. The light conditions may have changed between the time Moss learned of the absence of the bar at Samoa, and the time of opening the door; Emmett Whelihan, who discovered the absence of the bar on opening the door (Apostles p. 152), may have a greater length of time in which to discover it; Otto Johnson's position may have assisted him in seeing the condition of affairs. But be that as it may, the fact still remains that conditions in general were similar and were dissimilar only in slight particulars.

Moreover the witness, Joseph Whelihan, whose experience as to position (Apostles pp. 120, 122) and presumably every other particular except in regard to approaching the door and assisting to open it, was similar to Early, discovered the bar was not up (Apostles p. 131). And the exception last referred to, to wit, that Early approached the door and helped to complete the opening of the door while Joseph Whelihan did not, gave greater opportunity of knowledge to Early than to Joseph Whelihan.

We have mentioned the factors bearing on the dissimilarity of opportunities of acquiring knowledge between Early and the four witnesses. There is no certainty that these factors weigh against Early's opportunity. On the other hand, it is certain that the majority of factors for gathering knowledge were afforded him, just as they were afforded the four witnesses. These factors were visibility, lack of obstructions, size of the absent bar, the position of the bar when in place, and the lack of awkwardness resulting from these men not confined by a bar while pushing.

II.

THE APPELLANT IS ENTITLED TO A DIVISION OF DAMAGES.

The rule of division of damages applies when both parties to an accident were negligent. This, therefore, requires an investigation of the follow-

ing: (a) Were both parties negligent in the instant case, and (b) does the rule apply to death case?

A. Both parties were negligent in the instant case.

There is no necessity of discussion on the question whether Coggeshall Launch Company, the appellant, was negligent. The court has found that to be the fact and has rendered a judgment accordingly.

However, there has been no judgment that Early was also guilty of negligence and in consequence we must ascertain that such is the fact or else the proposition of this topic falls.

In Appellant's Brief before this court, and in the present Petition for Rehearing, it has been strenuously contended by the appellant that Early was guilty of contributory negligence and that claimant's action should be barred on that account. The present argument is not directed toward contributory negligence which will bar claimant's action, but to any negligence, not sufficient to constitute a bar, but which should be considered in reference to the rule of division of damages.

The evidence referred to is, of course, the same evidence relied on in this petition seeking to sustain the contention that there was negligence by Early sufficient to constitute a bar to claimant's action. It is submitted that even if the evidence does not make out the defense claimed, it does show a degree of negligence on the part of Early and

should be considered in applying the rule for a division of damages. The contention that there is some evidence of negligence on the part of Early is borne out by the opinion of this court in affirming the judgment below. This court in its decision states with reference to the District Court judgment that "the court found the launch company was guilty of the negligence alleged against it, and that the deceased was not guilty of contributory negligence". Further on in the opinion this court further states that "We also agree with the court below that the facts and circumstances of the case were not such as to require or justify a finding of contributory negligence on the part of the deceased". The object of the petitioner in thus pointing out these two statements of this court's opinion is to call attention to the fact that these two comments are the only ones in the opinion referring to the subject, and that both merely state that this court agrees with the court below in its conclusions on the subject of contributory negligence. Further on in this court's opinion, however, there is incorporated a part of the discussion of the court below on this subject of contributory negligence. In this excerpt of the District Court's opinion we find this statement: "Though an examination would have disclosed to him (Early) the absence of the protecting bar, his (Early's) failure to make such examination, having in view all the circumstances, can neither excuse such absence, nor charge him with such

degree of negligence as to relieve petitioners from responsibility." This statement, may it please the court, involves two conclusions; first, that Early's conduct in view of the circumstances can not excuse the absence of the bar, and secondly, it is not sufficient to relieve petitioners from responsibility. The first conclusion relates to whether or not Early's conduct was sufficient to excuse the company for failing to put in the protecting bar and Early's conduct did not constitute an excuse and that there was negligence on the part of the company. The second conclusion is one which assumes the company's negligence and states Early's conduct did not relieve petitioners from responsibility; or in other words, Early's conduct was not such, as to constitute a bar to the negligence, responsibility for which had been fastened on petitioners, and from which petitioners were seeking to be relieved.

The preceding discussion of the excerpt leads to the particular phrase in the same, which is susceptible of only one conclusion—"that the lower court did find some negligence". The court in considering Early's conduct concludes that it (Early's conduct) did not charge him (Early) "with such degree of negligence as to relieve petitioners from responsibility". The phrase does not state that Early had not been negligent at all. The inference is that he was negligent, but not to the extent that the negligence constituted a defense in bar to the action. The inference is

strengthened by the knowledge that there are different degrees of negligence, and also by the fact that it cannot be assumed that the court used the phrase in question needlessly, and without intention that it means exactly what it infers, to wit, that there was some negligence. If the court found there was no negligence it could have so stated in its opinion. It does not so state that there was no negligence but does state that there was not "such degree of negligence as to relieve petitioners from responsibility."

Assuming therefore that the situation presented discloses either that the question of any negligence has not been passed on, or if passed on, only considered in reference to it being sufficient in degree to constitute an absolute defense, it becomes necessary to discover the application of the rule of division of damages.

The rule of dividing the damages where both parties are at fault was first applied to collision cases only; afterward extended to all cases of maritime tort occasioned by concurrent negligence. See *The Max Morris,* 137 U. S. 1; 34 L. ed. 586.

It is stated in the text books that this rule, while applicable to ordinary personal injury cases has no application to injuries resulting in death. See I. C. J., 1327-1328; Sec. 238, 239, *Hughes on Admiralty.*

In the latter citation, *Hughes on Admiralty,* at page 208 it is stated that

"There is one anomaly in the decisions on the subject—

In personal injury cases, not fatal, the damages are divided, not equally, but much as the judge may think equitable, considering the circumstances and the relative fault of the parties.

In other words, in all other admiralty cases contributory negligence reduces recovery but does not defeat it. But in this case the rigid doctrine of the common law as to contributory negligence is applied."

Bearing on this question there are certain statements of United States Supreme Court decisions to which we desire to call this court's attention. In the case of *The Max Morris,* 137 U. S. 1, 34 L. ed. 586, at page 588, the court states:

"But the plaintiff has elected to bring suit in an admiralty court, which has jurisdiction of the case, notwithstanding the concurrent right to sue at law. In this court the course of proceeding is in many respects different and the rules of decision are different. The mode of pleading is different, the proceeding more summary and informal, and neither party has a right to trial by jury. An important difference as regards this case is the rule for estimating the damage. In the common law court the defendant must pay all the damages or none. If there has been on the part of the plaintiffs such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the admiralty court, where there has been such contributory negligence, or, in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties.

This rule of the admiralty commends itself quite as favorably in its influence in securing practical justice as the other; and the plaintiff who has the selection of the forum in which he will litigate cannot complain of the rule of that forum. This court, therefore, treated the case as if it had been one of a collision between two vessels."

And at page 589:

"This principle, it is contended, is sanctioned by the language used by this court in The Marianna Flora, 24 U. S. 11 Wheat. 1, 54 (6:405, 417): 'Even in cases of marine torts, independent of prize, courts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have not circumscribed themselves within the positive boundaries of mere municipal law'; and in The Palmyra, 25 U. S. (12 Wheat. 1), 17: (6:531, 536): 'In the admiralty, the award of damages always rests in the sound discretion of the court, under all the circumstances.'"

And at page 589:

"All these were cases in admiralty, and were not cases of collision between two vessels. They show an amelioration of the common-law rule, and an extension of the admiralty rule in a direction which we think is manifestly just and proper. Contributory negligence, in a case like the present, should not wholly bar recovery. There would have been no injury to the libelant but for the fault of the vessel; and while, on the one hand, the court ought not to give him full compensation for his injury, where he himself was partly in fault, it ought not, on the other hand, to be restrained from saying that the fact of his negligence should not

> deprive him of all recovery of damages. As stated by the District Judge in his opinion in the present case, the more equal distribution of justice, the dictates of humanity, the safety of life and limb and the public good will be best promoted by holding vessels liable to bearing some part of the actual pecuniary loss sustained by the libelant, in a case like the present, where their fault is clear, provided the libelant's fault, though evident, is neither willful, nor gross, nor inexcusable, and where the other circumstances present a strong case for his relief. We think this rule is applicable to all like cases of marine tort, founded upon negligence and prosecuted in admiralty, as in harmony with the rule for the division of damages in cases of collision. The mere fact of the negligence of the libelant as partly occasioning the injuries to him, when they also occurred partly through the negligence of the officers of the vessel, does not debar him entirely from a recovery".

In the case of *Workmen v. Mayor etc., New York,* 179 U. S. 552; 45 L. ed. 314, at page 321, the court in commenting on *The Max Morris,* supra, states:

> "This distinction is well illustrated by the ruling in the Max Morris (1890), 137 U. S. 1, 14, sub. nom. The Max Morris. v. Curry, 34 L. ed. 586, 589; 11 Sup. Ct. Rep. 29. There it was asserted that by the universal principles of the common law, as well as of the local laws of the states, no right to recover for a wrong committed could be enforced in favor of one who had himself contributed to the producing cause of the injury, whilst the premise was conceded, the soundness of the inference deduced from it was denied, and it was held that as by the general principles of the maritime law a measure of relief would be afforded

> to a person who had suffered a wrong, even although he had contributed thereto, it was the duty of the admiralty courts to grant relief in accordance with the principles of the maritime law".

These decisions point out that in personal injury cases the plaintiff has an election of suing for the injury in admiralty or at law. Having elected to sue in the admiralty court, the parties are entitled to the rule of division of damages; having elected to sue in a law court, the parties are not entitled to the rule of division of damage. The decisions do not say that the admiralty court as such can and will apply either admiralty rules or law rules, but that, having jurisdiction of the case, it will apply the admiralty rule in question. Nothing is said in these cases about the application of the rule to death cases, but the text books above referred to, do state that in such actions the courts will not apply the rule. The cases cited by these text books do not sustain the statement. In the case of *Gretchman v. Fix,* 189 F. 716, one of the decisions cited by the text books decides at pages 718:

> "In proceeding in admiralty for causing death by negligence the remedy is derived from the state Statute which gives the right of action to the next of kin, and concededly the common law doctrine of contributory negligence has application to the facts under consideration".

And in the case of *Robinson v. Detroit etc. Co.,* 73 F. 883, another case cited by the text books, the courts state at page 894:

> "It seems to be well settled by the law of England and by the law of this country that rights of action arising in admiralty under Lord Campbell's act and similar acts are to be enforced according to the principles of the common law and that contributory negligence is a complete bar to a recovery."

Again in *The A. W. Thompson,* 39 Fed. 115, also cited by text books at page 117:

> "The action rests entirely upon the state statute. Any defense therefore that would bar recovery in the state court, with reference to which the statute must be deemed enacted must be held equally good in the admiralty."

It is apparent that in none of these cases was the question of division of damages considered. The cases merely hold that if contributory negligence is present it will constitute a bar because the basis of the action being a state statute, any defense thereto under the state statute will be applied. The cases do not consider "such degree of negligence" which does not in view of all the circumstances constitute contributory negligence. They do not consider a situation where there was some fault on the part of the plaintiff not sufficient to constitute a bar to the action.

The only case in which the claim of division of damages in a death case seems to be discussed is the case of *In re Meyer,* 74 Fed. 881. This case was determined by the District Court for the Northern District of California. On page 896 the court states:

> "The facts of this case do not bring the death of Robinson within the provisions of Section 4493, Rev. St. U. S., nor within the principles announced by the Supreme Court in The Max Morris, 137 U. S. 1, 8, 11 Sup. Ct. 29, where it was held that there being negligence established against the officers of the vessel, the libelant was not debarred from the recovery of any sum of money by reason of the fact that his own negligence contributed to the accident".

The court seems to assume that the doctrine is applicable in death cases but not in the particular case considered. While the case is not satisfactory it does infer that the rule of division of damage extends to death cases.

In the case of *The Max Morris,* supra, the court, it is true, is considering a personal injury case where there are concurrent rights on action for the one injury; one based on common law tort and the other maritime tort. But there is nothing stated therein, nor in any other case we can find, that either of these actions can be prosecuted in the admiralty and that only the remedies peculiar to either, will be applied in an admiralty court. It may be such is the law, but the case does not so decide. The decision states that the plaintiff has a choice of forums, and having chosen the admiralty, the rules of admiralty, including division of damages, will be applied.

In the instant case the admiralty court has jurisdiction of the cause by virtue of a limitation of liability proceeding. Having that jurisdiction will the

mere fact that the claimant's right of action arises from a California statute make the admiralty rule of division of damages inapplicable? Perhaps that is the law, but if so, there seems to be no expression by a federal court. The extent of expression by federal courts decision in this regard is as contained in the cases cited above, where the absolute bar of contributory negligence is applied when the degree of negligence is sufficient to make out that defense. No consideration in a death case has ever been given of a claim of the admiralty rule of division of damages where the evidence does not disclose such degree of negligence as to make out the defense of contributory negligence. That there can be negligence, that there can be fault or blame not amounting to contributory negligence but sufficient to be considered in mitigation of damages has been determined in several jurisdictions.

Southern R. Co. v. Pugh, 97 Tenn. 624; 37 S. W. 555;

Dush v. Fitzhugh, 2 Lea (Tenn.) 307;

Jess v. Quebec etc. Ferry Co., 25 Quebec Super. Ct. 224;

R. Co. v. Matkin, (Tex. Civ. App.) 142 S. W. 604;

Paquet v. Dufour, 39 Can. S. Ct. 332;

Chemical Co. v. Lefebvre, 42 Can. S. Ct. 402.

See

R. Co. v. Willis, 58 Fla. 307; 51 S. 134;

Taylor v. R. etc. Co., 16 Philippine 8 (dictum);

R. Co. v. Binkley, 127 Tenn. 77; 153 S. W. 59.

See

Fleming v. R. Co., 160 N. C. 196; 76 S. E. 212.

That there was some negligence in this case is apparent from the evidence itself and the opinion of the trial court. From the standpoint of equity and justice the rule of division of damages should be applied here.

The Constitution of the United States provides that the judicial power of United States shall extend to all cases of admiralty and maritime jurisdiction.

U. S. Const., Art. 3, Sec. 2.

However, it has been held that this jurisdiction is not exclusive, and that state legislation may effect matters intrinsically maritime. The extent to which this is permissible is questionable. It has been stated in *Southern Pacific v. Jensen,* 244 U. S. 205; 61 L. ed. 1086, at page 1098 that:

> "In view of these constitutional provisions and the federal act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied."

In view of this condition of the law it is interesting to note the consideration given *The Max Morris,*

supra, in the case of *Howard v. Illinois Central Railway Co.*, 207 U. S. 463; 52 L. ed. 297, where the court considers the application of death statutes with regard to the jurisdiction of the admiralty courts on matters essentially maritime. At page 325 the court states:

> "State statutes allowing a recovery for death were sustained in American S. B. Co. v. Chase, 16 Wall. 522, 21 L. ed. 369, and Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819, though the statute was attacked in the first case only on the ground that it intruded upon the admiralty jurisdiction exclusively vested in the courts of the United States, and in the second case because it interfered with interstate commerce, whose regulation was vested exclusively in Congress. Statutes of this kind have been in force in the states and doubtless in the territories for many years, many cases have been tried under them, and in no case has it ever been claimed that anything in the constitution removes them from the legislative power. The same observation may be made, though not so emphatically, of statutes modifying the common-law rule denying a recovery to one contributing to the injury by his own neglect. It is interesting to note that this court, acting upon the same reasons which doubtless influenced Congress in the enactment of this part of the statute, and established a rule in principle the same to govern the recovery in admiralty of damages by a person injured on a ship. The Max Morris (The Max Morris v. Curry), 137 U. S. 1, 34 L. ed. 586, 11 Sup. Ct. Rep. 29, holding that it promoted 'the more equal distribution of justice, the dictates of humanity, the safety of life and limb and the public good.' "

In view of these decisions and of the tendency of the admiralty courts to consider equity principles, is it not just and proper, that this court in spite of the nature of the statute under which this death claim is made and the statutory defense thereto, apply principles of equity as found in the rules of admiralty and divide the damages in this cause in accordance with the fault on either party.

III.

The evidence discloses that Moss and Whelihan were negligent in opening the door when they knew that the doorway was unprotected, and on this account the amount of damages adjudged against appellant should be diminished.

The answer to the above proposition is obvious. Moss and Whelihan are not parties to this action and so damages can not be awarded against them. Granting that such is the case, however, in the application of the principles of justice and humanity referred to in *The Max Morris,* supra, should an amount of damages be awarded against the appellant which includes not only the extent of its fault but also the fault of two other persons?

In the case of *No. 6 H.,* 108 Fed. 429, the question in issue was responsibility for damage to five scows. Two scows were fastened by strong lines to a dock by libelant. One of the respondents fastened two scows outside of libelant's scows, and

the other respondent fastened one scow. While the mooring was strong enough to hold libelant's scows, it was not strong enough to hold the whole five. It was the custom to moor scows outside of one another. The scows broke away and were damaged. The court held that fault lay upon all parties and the damages should be accordingly apportioned. On page 432 the court states:

> "The damages should be ascertained and one-third thereof borne by the libelants and two-thirds by the outlying scows, each scow as against the other outlying scows bearing two-ninths of all the damage. The Brothers, 2 Biss 104, Fed. Cas. No. 1,969; The Peshtigo (D. C.), 25 Fed. 488, 401. The legality of such apportionment is recognized in The Anerly (D. C.), 48 Fed. 794, 796."

Approved:

McWilliams v. City of New York, 134 Fed. 1015 (1917).

In the instant case Moss had closed the door at Samoa (Apostles p. 95). He noticed the bar was not in place (Apostles p. 106). On the way over Moss together with Emmett Whelihan opened the door (Apostles p. 146). Emmett Whelihan noticed the bar was not up (Apostles p. 152). The opinion of the trial court concludes that always prior to that evening the bar had been up (Apostles p. 285). There is no evidence that either Whelihan or Moss told Early that the bar was not up. If they did Early is guilty of contributory negligence. If they did not, with the knowledge they had, is not some

of the blame for this accident upon their shoulders? Having noticed a dangerous situation—one which had never before presented itself to them—are they not somewhat at fault for not calling Early's attention to it?

If Moss and Whelihan are somewhat at fault, this court sitting in admiralty should, in application of the rules of equity and humanity and fairness, reduce the claim against appellant to the extent that the accident was the fault of others.

Dated, Eureka,
March 25, 1918.

Respectfully submitted,

CLARENCE COONAN,
NAT SCHMULOWITZ,
Proctors for Appellant and Petitioner.

P. H. RYAN,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

CLARENCE COONAN,
Of Counsel for Appellant and Petitioner.